***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,729

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MORRIS FULLER,

Appellant

v.

THE UNITED STATES OF AMERICA

Appellee

Appeal from a judgment of the United States District Court for the District of Columbia, Criminal.



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by Appointment of this
Court
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Washington, D.C. 20036

## I N D E X



## TABLE OF CASES

## QUESTIONS PRESENTED

I

Whether the Judge in the lower Court erred in refusing to be bound by an earlier ruling by a Judge of the D.C. Court of Appeals, in a case with the same parties, same fact situation, and involving a final judgment, which held that the search made of Appellant's car was unlawful, and the proceeds of this search were not admissable in evidence.

II

Whether, even if this Court finds that the earlier ruling did not operate as collateral estoppal, the lower Court erred in not finding, independent of that ruling, the search unlawful, and the products thereof "fruit of the poison tree", and accordingly inadmissable.

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# BRIEF FOR APPELLANT

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## JURISDICTIONAL STATEMENT

This is an appeal from a final order of the U.S. District Court for the District of Columbia. The jurisdiction of this Court is invoked under Section 1291, Title 28, United States Code. The judgment appealed from is a final judgment within the meaning of the aforesaid statutory provision. An appeal was duly noted and perfected within the time limitations provided by the applicable statutes and Rules of this Court.

This case has not previously been before this Court.

## REFERENCE TO RULINGS

1. Judgment entered June 14, 1967, D.C. Court of General Sessions.

2. Memorandum opinion filed December 4, 1967, in the U.S. District Court for the District of Columbia, denying Appellant's motion to suppress the evidence.

## STATEMENT OF THE CASE

In the early morning hours of February 12, 1967, Appellant was stopped by an officer of the M.P.D., for driving without lights. When it developed that he did not have a driver's license or automobile registration immediately available, he was taken to the precinct (tr. 15-16). He did locate the registration card, but conceded that he did not have a valid D.C. permit (tr. 16). After the officer had verfied that the automobile, which did not belong to the Appellant was, in fact, being used with the owner's permission, Appellant was charged with two traffic offenses. He was booked, searched, and placed in a cell to await either the posting of collateral, or transportation to Court, whichever came first (tr. 17). The officer proceeded to the precinct parking lot to search the vehicle and secure it until it was reclaimed by the owner (tr. 18).

During this search, he discovered some vials of Methergine and a bottle of Desoxyn. Since the Methergine was "known to the officer to be a dangerous drug", he returned to the precinct, and did an all-out search of the Appellant. (Interestingly enough, apart from the complained of illegality, the officer was acting on a mistaken premise.

Methergine is not among the proscribed or "dangerous drugs" within the purview of the statute (Tr. 48; 33 D.C. Code, Sec. 701).

As a result of this pair of searches, Appellant was charged by an information filed in the D.C. Court of General Sessions for the unlawful possession of desoxyn (Cr. U.S. 1419-67, U.S. v. Morris Fuller), and by indictment in the U.S. District Court for the District of Columbia with possession and facilitation of concealment of heroin. This heroin was discovered as a result of the second search, which was triggered by the discovery, made by the officer, during his allegedly unlawful search of the car.

During the trial in the D.C. Court of General Sessions, the presiding judge, sitting without a jury, granted a motion by defense counsel to suppress the evidence, on the ground that the search and subsequent seizure were unlawful, and entered a judgment of acquittal as to the offense chargedin the information.

The trial on the indictment in the U.S. District Court was also held without a jury, and the questions cited above were raised by the defense. A memorandum in support of the motion to suppress was filed by the defense; the motion was denied in a memorandum opinion filed December 4, 1967, the Appellant was found guilty as charged, and was subsequently sentenced to a term of imprisonment for ten years.

## STATUTE INVOLVED

26 United States Code 4702(a): "It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package, or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotis drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

21 United States Code, 174: "Whoever fraudently or knowingly imports or brings any narcotic drug into the United States or any territory under tts control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the law of the United States shall...be punished.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

## STATEMENT OF POINTS

### I

Appellant contends that the ruling of the Judge of the District of Columbia Court of General Sessions, made during the course of a trial which involved the same parties, and same set of facts, and resulting in a final judgment of acquittal, constitutes collateral estoppal; that the Judge of the U.S. District Court was bound by this determination, and accordingly should have ruled that the search of the Appellant's person, a direct result of the unlawful search of the car, was fruit of the poisonous tree, and should have ruled the products of that search inadmissable accordingly.

### II

Apart from the collateral estoppal issue, Appellant contends that on its merits the ruling of the General Sessions Judge was correct; that the search of the car was just that, not merely a check to secure the car; and being unlawful, the subsequent search of his person which resulted from it was poison fruit and should have been so adjudged.

## SUMMARY OF ARGUMENT

I

During the trial of other charges arising from the search of the automobile, the presiding judge, sitting without a jury, found that the search was unlawful; suppressed the evidence so recovered, and entered a judgment of acquittal on that charge. Appellant contends that this trial and its resolution meet all the criteria necessary to constitute collateral estoppal (same parties, full litigation, and resolution by final judgment). Accordingly, he contends that the trial judge below should have followed this ruling, and held that the search which was directly triggered by this unlawful seizure was equally improper, and its pooducts ruled inadmissable.

II

Apart from the doctrine of collateral estoppal, Appellant urges that, on the merits, the ruling of the Judge of the D.C. Court of General Sessions, that the search was in fact unlawful was correct, and should have been followed by the lower Court here. The evidence seized was not in plain view (tr. 35), but was seen by the officer with the door open, and himself "on the floorboard". In fact, according to the transcript of the earlier trial, the eyeglass case was immediately under the driver's seat, add no mention was made of its protruding even slightly (tr. 29-30). Appellant accordingly contends that the search of the car was not a mere securing of the vehicle for the convenience of the owner, but was an outright and unwarranted search. He fruther contends that the search of his person, whtch was a direct

result of the search of the automobile, was equally unlawful, and that the materials so seized should have been suppressed as well.

## A R G U M E N T

### I

A granting of the motion to suppress was required by the earlier determination by another Court, operating as collateral estoppal, that the search of the automobile was unlawful.

With respect to this point, Appellant desires the Court to read the record certified from the D.C. Court of General Sessions.

In his memorandum opinion denying the motion to suppress, J. Gasch cites, among other cases, the ruling by Judge Tamm, then sitting in the U.S. District Court, in the Van Voorhis v. D.C. case (240 Fed. Supp. 822, 824. There, J. Curran had denied a motion for summary judgment, and J. Tamm was ruling on a renewed motion, following a trial which ended in a mistrial because of the failure of the jury to reach a verdict. J. Tamm points out that his ruling is an appealable order on a point of law which would doubtless be appealed at some time; by ruling when he did, he was avoiding a second, long, costly, and perhaps again inconclusive trial, which might still have resulted in a reversal by this Court on that very point of law.

In his opinion, J. Tamm cites the Messenger case (225 U.S. 436, 32 S.C. 739), in support of his proposition that the law of the case is convenient rather than binding. However, a reading of the Messenger opinion indicates that the basis for the Supreme Court's ruling was that a conflicting determination of the legal issues relating

to the will which was the subject of the litigation had been handed down after the Court of Appeals had first ruled, and that their second, not their first ruling was in accord with the ruling of the superior Court; and, further, that their first ruling was wrong anyway!

In a ruling on a motion for clarification under Naples v. U.S., 359 F.2d 276, this Court pointed out (123 U.S. App. D.C. 292) that new evidence may affect that "law of the case". But this is not the situation here. A comparison of the transcript of the trial in the Court of General Sessions and the testimony in the U.S. DIstrict Court reveals little new matter.

However, it is submitted that this goes beyond the "law of the case" situation, to the realm of the doctrine of collateral estoppal. That this applies to criminal as well as civil cases is clear: see Sealfon v. U.S., 332 U.S. 575; Laughlin v. U.S., 120 U.S. App. D.C. 93, 344 F. 2d 187. The factual situation here meets the necessary criteria: "That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law that were essential to the decision." "To invoke that doctrine however, the party must show that an important issue of fact has been previously litigated by the same parties, and resolved by final judgment in the prior litigation." Moore v. U.S., 120 U.S. App. D.C. 173, 344 F. 2d 558. "Prerequisites to application of the doctrine are 'full litigation and final determination". Laughtin v. U.S., supra.

This case is clearly distinguishable from the facts in Watts v. U.S., 402 F. 2d 676 (cert. granted; case remanded with order

to enter judgment of acquittal on other grounds; No. 1107, Misc., dec. April 21, 1969). In Watts, a pre-trial motion to suppress was heard and granted; the prosecution accordingly dismissed the charges in the lower Court, before trial. Here, the ruling was made after a full trial on the facts, and resulted, not in a nolle, but in a judgment of acquittal. Such a judgment certainly satisfies the requirement of finality, as it operated as a final judgment, conclusively establishing a matter of fact and/or law for the purposes of a later law suit. (See U.S. Kramer, 289 F. 2d 909, 2d Circ.)

Accordingly, Appellant asserts that the D.C. General Sessions Court ruling meets all the relevant criterai for collateral estoppal, and falls squarely under the protection afforded in the Sealfon case (supra).

If this is so, then it follows that the search of the person of the Appellant which resulted from this unlawful search of the car was a classic "poison fruit" search, and its products should have been ruled inadmissable. Among the relevant cases in this jurisdiction is that of Spriggs v. U.S., 118 U.S. App. D.C. 248, 335 F.2d 283, where this Court suppressed a confession given during a period while the officer was filling out forms required following an arrest. In reversing the conviction, the Court said that the police cannot evade the law by the requirements of the police regulations (emphasis added). The opinion goes on to say that, granted that the regulation is necessary for the orderly handling of the prisoner, that still does not mean that evidence elicited thereby is admissable.

Among other pertinent cases on this point are Fahy v. Conn., 375 U.S. 85, at 89; Greenwell v. U.S., 119 U.S. App. D.C. 43, Nardone v. U.S., 308 U.S. 338, and U.S. v. Marrese, 336 F.2d 501. In the latter case, a shotgun was seized during an unlawful search; confronted with the unlawfully seized gun, the defendant signed a confession. The Court ordered both the gun and the statement suppressed, on the basis that the statement was a tainted product of the unlawful search.

All of these cases are, of course, descended from the same parent - Silverthorne Lumber, 251 U.S. 385, whose language appears applicable here: (at 392) "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that the evidence so acquired not be used before the Court, but that it shall not be used at all."

The Charles case, cited by J. Gasch in his opinion (278 F. 2d 386; 9th Circ.), differs factually. There the defendant was "frisked" (as here), and then told to empty his pockets (as here); but it was the emptying of the pockets which produced the contraband, and was the unlawful "Second search" complained of. It did not involve an intervening, unlawful search of an automobile (or anything else), which resulted in the defendant's being removed from his cell and totally re-searched, which was the case here. The complaint here is that the second search was the direct result of the unlawful search of the car; but for that search, it would never have occurred. Accordingly, it is contended that the evidence was clearly "poison fruit" and should not have been received.

II

*Even if the District Court were not bound by the doctrine of collateral estoppal, the motion to suppress should have been granted on its own merits.*

*With respect to this point, Appellant desires the Court to read the following pages of the trial transcript: 17-19; 24, 28-31; 33-35; 49-51.*

*Appellant submits that independent of the issue of the doctrine of collateral estoppal, the motion to suppress should have been granted on its merits. The case is clearly distinguishable from the factual situation in en banc opinion in the Harris case ( U.S. App. D.C. ; 370 F.2d 477; cert. granted, 386 U.S. 1003; aff.), where the evidence seized was in plain view, and the Courts held that there was not a search in the usual sense of the word.*

*To the contrary, the situation here is that the eyeglass case containing the drugs, whose discovery triggered the second search was under the seat - it was so inconspicuous that the officer, who drove the car back to the precinct did not see it then; did not see it while he was securing the passenger side of the car; did not see it until he was "down on the floor-boards". Counsel respectfully disagrees with J. Gasch's comment that the case was in "open view" (opinion, p. 5). That is not what the officer said, either at the hearing in General Sessions or at the hearing in District Court.*

*The factual situation here brings it far more closely under the principles set forth in Smith v. U.S., 118 U.S. App. D.C. 235, 335 F. 2d 270; and the parent case, Preston v. U.S., 376 U.S. 364 (see also, in this connection, Spriggs v. U.S., Fahy v. Conn., supra, p. 11).*

If Appellant's assertion is correct, and the Court finds that the search of the automobile was indeed unlawful, then, as above, he contends that the search of his person which this triggered, was also unlawful, under the "poison fruit doctrine", as discussed supra, under the first argument.(pp. 10-11, this brief).

## CONCLUSION

Appellant respectfully urges that this Court rule that the search of his person on the second occasion was an unlawful result of an unlawful search, and requests that this Court reverse his conviction, and remand the case to the US. District Court for the District of Columbia with directions that the materials so discovered and seized be ruled inadmissable, and for such further proceedings as may then ensue.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was delivered to the office of the U.S. Attorney for the District of Columbia this day of December, 1969.

Jean F. Dwyer, Counsel for Appellant
by Appointment of this Court